STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS KILLINGHAM,

Defendant-Appellant.

UNPUBLISHED
April 18, 1997

No. 175400
Recorder's Court
LC No. 93-009087

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL LOVE,

Defendant-Appellant.

No. 175420
Recorder's Court
LC No. 93-009087

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR HOUSER,

Defendant-Appellant.

No. 175625
Recorder's Court
LC No. 93-009087

Before: Gribbs, P.J., and Young and Caprathe,* JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

Defendants Killingham, Love and Houser were each convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and defendants Killingham and Love were also each convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felonious assault, MCL 750.82; MSA 28.277, at a joint jury trial. Defendants Killingham and Love were each sentenced to concurrent prison terms of four to fifteen years for the armed robbery conviction, four to ten years for the assault with intent to do great bodily harm conviction, and two to four years for the felonious assault conviction, to be served consecutive to a two year term for the felony-firearm conviction. Houser was sentenced to a term of eight to fifteen years of imprisonment for the armed robbery conviction and a two year consecutive term for the felony-firearm conviction. All three defendants appeal as of right. Their appeals have been consolidated.

Docket No. 175400

Defendant Killingham first contends that his trial attorney was ineffective for failing to present or investigate a possible alibi defense. Because Killingham did not raise this issue in a motion for a new trial or evidentiary hearing, appellate review is foreclosed unless the record contains sufficient detail to support the defendant's claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). Here, the available record does not factually support Killingham's claim. On the contrary, Killingham's claim of alibi is contradicted by his own testimony at trial. Specifically, Killingham admitted being present at the location where the complainant's car allegedly was stolen on the evening of the alleged offense. Killingham also asserts that trial counsel was ineffective because he failed to properly prepare for trial. However, Killingham does not indicate in what manner defense counsel was unprepared, nor does he explain how he was prejudiced by any alleged lack of preparation. Thus, Killingham has failed to show that defense counsel was ineffective. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Second, Killingham argues that the evidence was insufficient to prove that he acted with the requisite intent to commit armed robbery. In reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, the complainant testified that all three codefendants surrounded his car and threatened him at gunpoint, and defendant Houser ordered him to get out. The complainant further testified that he got out of his car because he feared for his life, whereupon defendant Houser climbed inside. Additionally, the complainant testified that he heard four or five gunshots as he ran from the scene. Viewed in a light most favorable to the prosecution, this testimony was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that Killingham acted with an intent to permanently deprive the complainant

of his automobile. *Wolfe, supra*; *People v Hurst*, 205 Mich App 634, 638, 640; 517 NW2d 858 (1994).

Third, Killingham alleges error in the trial court's jury instructions. Killingham claims that the trial court erred in failing to instruct the jury on unarmed robbery. However, the record indicates that Killingham never requested such an instruction. Also, contrary to what Killingham argues, the "central issue" in this case did not concern the presence or absence of a weapon, but, rather, whether any robbery occurred in the first instance. Accordingly, the trial court's failure to instruct on unarmed robbery does not warrant relief. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

Next, Killingham argues that the trial court failed to include the definition of firearm in its felony-firearm instruction. Killingham neither objected to the instruction, nor did he request an instruction on the definition of a firearm. Therefore, appellate review of this issue is foreclosed absent manifest injustice. *Hendricks, supra* at 440-441; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because there was no dispute whether the weapon in question was a firearm, we find that failure to instruct on the definition of a firearm did not result in manifest injustice. See *People v Hunt*, 120 Mich App 736, 742; 327 NW2d 547 (1982).

Killingham lastly alleges that the prosecutor made prejudicial remarks during closing argument. Killingham neither objected to the remarks nor requested a curative instruction. Viewing the challenged remarks in context, it appears that the prosecutor was not attacking defense counsel personally, but, rather, was merely arguing that defense counsel's theory was not supported by the evidence at trial. To the extent the remarks could be viewed as improperly denigrating defense counsel as Killingham suggests, a curative instruction would have cured any prejudicial effect. Therefore, appellate relief is precluded. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Docket No. 175420

Defendant Love first challenges the sufficiency of the verdicts regarding the charges for assault with intent to do great bodily harm and assault with a dangerous weapon. Because Love did not object to the nature or form of the verdicts in the trial court, his challenge is waived absent manifest injustice. *People v Clyburn*, 55 Mich App 454, 461; 222 NW2d 775 (1974).

The jury was instructed on the charged offenses of assault with intent to murder and on the two lesser offenses of assault with intent to do great bodily harm less than murder, and assault with a dangerous weapon. The language used by the jury foreperson in rendering the verdicts, "guilty of bodily harm" and "guilty of a dangerous weapon" was sufficiently clear to identify the crimes for which Love was convicted. *People v Combs*, 69 Mich App 711, 719; 245 NW2d 338 (1976). The jury foreperson was not required to state the statutory language when rendering the verdicts. *People v Levey*, 206 Mich 129, 133; 172 NW 427 (1919). Furthermore, additional clarification of the verdicts was provided when, immediately after the foreperson announced the verdicts, the jury was polled and each juror responded affirmatively when asked if Love was found "guilty of robbery armed, *guilty of*

assault with intent to do great bodily harm less than murder, guilty of assault with a dangerous weapon, and guilty of possession of a firearm during the commission of a felony." (Emphasis supplied). Finally, the record indicates that Love was subsequently sentenced in accordance with these verdicts. Accordingly, manifest injustice has not been shown.

Love secondly raises errors in the court's jury instructions. Love contends that the trial court's instructions allowed the jury to convict defendant of the various assault offenses without finding beyond a reasonable doubt that he had the ability to commit a battery. Because defendant failed to object to these instructions, appellate review of this issue is precluded absent manifest injustice. *Van Dorsten, supra* at 544-545. The trial court instructed the jury in accordance with CJI2d 17.3, CJI2d 17.7, and CJI2d 17.9. Contrary to what Love argues on appeal, an assault "includes the element of present ability *or apparent present ability* to commit a battery" (emphasis supplied). *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Thus, the trial court's instructions were neither erroneous nor unjust.

Love next claims that reversal is required because the trial court failed to instruct the jury on unarmed robbery. Love did not request an instruction on unarmed robbery. *Hendricks, supra* at 440-441. Although an instruction on unarmed robbery was requested by the prosecutor, Love objected to this request and the trial court subsequently refused to instruct on unarmed robbery "per request of the defense." A party cannot request a certain action in the trial court and then, after the request has been followed, argue on appeal that the action was error. *People v Murry*, 106 Mich App 257, 262; 307 NW2d 464 (1981). Accordingly, relief is not warranted.

Third, Love contends that his sentence is invalid because the court failed to state the maximum sentence for Love's conviction for assault with intent to do great bodily harm less than murder. Although the sentencing transcript reflects what Love alleges, a maximum sentence of ten years was required by MCL 769.8; MSA 28.1080 and MCL 750.84; MSA 28.279. Further, the judgment of sentence indicates that Love received a maximum sentence of ten years in accordance with these statutes. See *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989) ("A court speaks through its written orders, not its oral statements.") Therefore, any error was harmless.

Love claims that he received ineffective assistance of counsel. Because this issue was not raised via an evidentiary hearing, appellate review of this issue is foreclosed unless the record contains sufficient detail to support Love's claim. *Ginther, supra* at 443; *Wilson, supra* at 612. In this case, the record does not factually support Love's various claims of ineffectiveness. First, defense counsel's decision to oppose the prosecution's request for an instruction on unarmed robbery was a matter of trial strategy. See *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983). As such, Love has failed to overcome the presumption that counsel's decision constituted sound strategy. *Stanaway, supra* at 687. Second, because the trial court's jury instructions defining the various assault offenses were not erroneous, defense counsel was not ineffective for failing to object. Finally, counsel was not ineffective for failing to object to the sufficiency of the jury verdicts because, as discussed previously, the verdicts were sufficiently clear to identify the offenses for which Love was convicted. Accordingly, Love was not denied the effective assistance of counsel. *Pickens, supra*.

Defendant Houser first argues that the prosecutor improperly referred to his incarceration when cross-examining a defense witness, Likwan Adams. Houser did not object to the line of inquiry in question, thereby precluding review of this issue absent manifest injustice. MRE 103(a); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Viewed in context, the prosecutor's line of questioning served a relevant purpose. It was intended to test the credibility of Adams' testimony on direct examination—that he had observed the complainant sell the subject automobile to Houser—by showing that Adams failed to go to the police with this exculpatory information, notwithstanding his admitted friendship with all three codefendants and his knowledge that all three of the codefendants had been charged with robbing the complainant of the automobile. Moreover, the only reference to Houser's incarceration occurred in the context of referring to the fact that he had been arrested in the present case, a fact which was already in evidence. Accordingly, we find that manifest injustice has not been shown.

Second, Houser argues that the trial court erred in refusing to admit the entire written statement of Leslie Holsey as an exhibit. The prior statement was not admitted as substantive evidence. Rather, the record indicates that defense counsel was allowed to read into evidence, for impeachment purposes only, portions of Holsey's prior written statement that were inconsistent with her trial testimony. Accord *People v Jenkins*, 450 Mich 249, 264; 537 NW2d 828 (1995). Accordingly, we find no error.

Defendant lastly contends that his due process rights were violated because the police failed to preserve some 911 tapes. However, failure to preserve potentially useful evidentiary material will not constitute a denial of due process absent a showing of bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Here, after receiving testimony on this issue, the trial court found, and we agree, that bad faith had not been shown. Regarding defendant's claim that the trial court should have instructed the jury that it could infer that the 911 tapes were adverse to the prosecution, the record indicates that defendant did not join in his codefendants' request for such an instruction. Therefore, this issue is not preserved. *Hendricks, supra* at 440-441; *People v Turner*, 213 Mich 558, 575; 540 NW2d 728 (1995).

Finally, our review of the record convinces us that defendant's armed robbery sentence was tailored to the particular circumstances of the case and the offender and does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe